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No. 94-1532

In The

# Supreme Court of the United States

October Term, 1994

PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT, JR.,

*Petitioners,*

v.

CITY OF ATLANTA, GEORGIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Georgia Supreme Court**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

Petitioners' statement contains inaccuracies and omissions. Respondent deems the following necessary to correct these deficiencies:

1. The ordinance applies to all qualifying surface parking lots within seven designated high density zoning districts, not to a specific lot or a specific number of lots. The ordinance does not require conversion of up to ten percent of paved areas; it requires landscaped areas equal to ten percent of the paved area. The ordinance does not require loss of three percent of parking spaces; it mandates that the ten percent landscape formula not reduce the number of parking spaces in an existing lot by more than three percent. The ordinance does not require a loss in annual advertising revenue. Petitioners' figure is speculative and based primarily, if not exclusively, upon factors not mandated by this ordinance.

2. The corrections noted for question 1 also apply to question 2. In addition, the parking lot owners, like the general public, benefit from these regulations.

3. The corrections noted for question 1 also apply to question 3.

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## STATEMENT OF THE CASE

Several inaccuracies and omissions exist in petitioners' Statement of the Case. Respondent deems it necessary to correct these matters as follows.

This is a facial challenge to a comprehensive zoning ordinance. The ordinance in question was adopted in May 1992, as an amendment to the City of Atlanta's Zoning Ordinance. Adoption of these amendments followed several years of study. Two studies in particular, the Downtown Parking Lot Study and the Central Area Study II, focused on crime, public health issues related to water run-off and air and water quality standards, and aesthetic considerations affecting residents and visitors in Atlanta. As a part of its comprehensive planning process, the City's planning professionals recommended legislation focusing on surface parking lots in the most critically affected areas. Following nearly a year of public comment, the Atlanta Zoning Ordinance was amended to include the regulations within seven very high density zoning districts adjacent to rapid transit stations. Owners that created new surface parking lots or elected to operate existing lots within the affected zoning districts were given two years to comply with the regulations.

Petitioners choose to focus on the portion of these regulations related to aesthetic considerations. The regulations, however, primarily address public safety and health concerns caused by the facilities regulated. The ordinance regulates parking attendants, lighting standards, maintenance, identification signs, and curb barriers. The ground coverage standards, while contributing

aesthetically, also address water run-off and ground contamination problems identified during the study period. Petitioners' characterization of the ordinance – "enacted in the name of aesthetics" – is simplistic and not supported in the record.

Petitioners' statement regarding respondent's failure to consider revenue loss is incorrect. City studies showed that any financial impact would be recovered within three years by a rate increase of between ten cents and thirty-two cents per space per day, and that further reduction in cost could be made possible by arrangement with a local non-profit organization. The ordinance itself caps the number of parking spaces lost due to implementation of the regulations at three percent. Allowable compact car spaces can be increased administratively from twenty-five to thirty-five percent. Administrative hardship variances – never utilized by petitioners – are available under the ordinance, and take into consideration factors such as size, shape, topography, subsurface conditions, overhead structures, and the existence of sufficient tree coverage.

The ordinance does not apply to property on a lot by lot or development basis. It applies to all property operated as surface parking within the seven zoning districts. The record shows that these zoning districts are those most seriously affected by the problems the regulations seek to help correct. The Georgia Supreme Court conclusion that "the affected districts have the greatest concentration of parking lots" is mandated by the record. Petitioners' statement that "lots located in most of the developed areas of the city are also exempted" is incorrect and factually unsupported. Similarly, petitioners'



statement that "sign companies will cancel their leases with the lot owners and remove billboards once they are obstructed by trees" is purely hypothetical, assuming it bears some relevance to the legal issues raised.

Finally, respondent observes that while petitioners seek to champion the cause of parking lot owners throughout Atlanta and perhaps elsewhere, these petitioners actually have ownership interests in only a few parcels. Petitioner Habif, with other unnamed partners, owns five affected locations. Petitioner Wright has two. The Parking Association of Georgia is an association purporting to represent operators or managers of parking lots affected by the ordinance. The other two petitioners are billboard advertisers that lease space for outdoor signs. Petitioners' claimed value loss for advertising assumes immediate and total tree obstruction and one hundred percent lease cancellation, a situation that does not exist. Similarly, the total revenue costs petitioners associate with these regulations assumes zero current compliance – which is far from the case – and reflects costs for all affected lots, the vast majority of which are not owned by these petitioners.

## REASONS FOR DENYING THE WRIT

### I. THERE IS NO CONFLICT WITH EXISTING TAKINGS JURISPRUDENCE

Petitioners contend the Supreme Court of Georgia misapplied *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) and *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Petitioners

incorrectly attempt to distinguish these decisions, however, and fail to acknowledge other direct precedent. A proper takings analysis shows that the decision below was a routine application of this Court's takings jurisprudence.

The test for a facial Fifth Amendment regulatory takings challenge is very well established. It was articulated in *Agins, supra,* and has been re-articulated by this Court on numerous occasions: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, *see Nectow v. Cambridge,* 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), or denies an owner economically viable use of his land, *see Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 138 n. 36, 98 S.Ct. 2646, 2666, 57 L.Ed.2d 631 (1978)." *Agins, supra,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

This petition presents a facial challenge to zoning regulations that apply to all qualifying property within seven specified zoning districts. The case involves no development permit and no conditional permit. The Georgia Supreme Court determined that both prongs of the *Agins* test were satisfied. The regulations plainly advance legitimate governmental interests in public safety, public health, and aesthetics. Each of these interests, and the means chosen to address them, are well established and hardly unique. Imposition of the regulations do not even arguably deny petitioners economically viable use of their property. They may continue to utilize their land for parking purposes, or they may re-utilize their land for any other allowed purpose. The cost of compliance, even assuming petitioners' inflated figures,



is far less than value loss resulting from regulations approved in numerous decisions previously before this Court, including *Agins, supra.* The Georgia Supreme Court properly ruled that these regulations do not offend the Fifth Amendment.

Given the clarity of law on this point, petitioners understandably seek to muddy the waters. They turn to *Dolan, supra,* and argue not for an extension of its reach, but for the simple proposition that *Dolan* was not applied, or perhaps incorrectly applied, to the facts of this case. Petitioners' attempt to apply *Dolan* ignores the obvious and employs an interpretation that entirely misses the point of the decision.

Petitioners quote but fail to explain the portion of the *Dolan* opinion that would result in denial of their petition. Distinguishing cases such as *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) and *Agins, supra,* this Court stated:

> The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

*Dolan, supra,* ___ U.S. at ___, 114 S.Ct. at 2316.

Unlike *Dolan*, the regulations here are legislative determinations classifying entire areas of the city. Petitioners' statement to the contrary (petition at 13) is factually incorrect. No adjudicative decisions or conditions exist. In addition, no deed or title transfer of any kind is involved. Parking lot owners retain title, retain the ability to exclude others, and retain all other elements of the bundle of rights associated with property ownership. The regulations are constitutionally indistinguishable from landscaped buffer requirements and zoning setbacks routinely utilized throughout this country since *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927). Each owner's utilization of the parcel as a whole is unaffected, if not enhanced, by these regulations. *See, e.g., Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Concrete Pipe and Products v. Construction Laborers Pension Trust*, ___ U.S. ___, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993).

Assuming application of *Dolan* to the facts presented by this petition were appropriate or even possible, respondent would observe that petitioners' analysis of the required nexus is wide of the mark. Petitioners appear to believe that the "nexus" discussed in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan* refers to a connection between the cost of compliance and the benefit to the landowner. (Petition at 13.) Those cases, however, explore the connection between the governmental interest behind the regulation and the condition attached to a redevelopment permit issued pursuant thereto. In *Nollan*, the lateral beach easement condition was found to be wholly unrelated to the public purpose supporting restrictions



on new house construction. In *Dolan*, taking title through an easement was not sufficiently related to flood control since a private greenway would have accomplished the same result. In neither case, nor in any other, has the analysis turned on the cost of compliance compared to the benefit to the landowner. Indeed, *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), discarded this kind of cost/benefit takings analysis in the nuisance context. While it is difficult to rationally correlate *Dolan* to the petition at bar due to its inapplicability, it is very clear, and petitioners do not dispute, that the regulations at bar are directly and precisely correlated to the public purpose behind them. Moreover, presumably out of an abundance of caution, the Georgia Supreme Court decided that any required rough proportionality had been amply demonstrated by the City. Petitioners' focus on a cost/benefit analysis misapplies this Court's decisions in this regard as well as the findings below, which are amply supported in the record.

The decision below routinely and properly applied well established law to the facts. This matter does not involve an important question of unsettled federal law or any conflict with applicable decisions from this Court. Accordingly, the petition for a writ of certiorari should be denied.

## II. THERE IS NO FIFTH AMENDMENT SPECIAL ASSESSMENT ANALYSIS

Whatever gray area may remain in the difficult field of regulatory takings, one issue no longer subject to

debate is that governmental regulations that advance legitimate state interests may lower property values or increase operating costs without violating the Fifth Amendment. *Agins, supra; Penn Central, supra; Gorieb, supra; Keystone, supra.* Skipping back some nine decades, petitioners cite to two non-zoning tax cases, contending that they create a Fifth Amendment "special assessment" rule that decades of takings jurisprudence have somehow neglected.

Perhaps the simplest response to petitioners' claim, in addition to the clarity of intervening case law to the contrary, is to observe that the linchpin of their claim – that these regulations are useless and of no benefit or applicability to them – is myopic in the extreme. First, it is petitioners' use of land that makes these regulations necessary.[1] Crime against property and persons, parking lot contamination of water and air, unchecked water run-off, unsafe means of ingress and egress, and vast aesthetic intrusions all are very real and well documented problems in Atlanta. These regulations directly address those problems. Second, the reciprocity of advantage supporting all zoning regulations is equally at play here. Petitioners enjoy a strong market for use of land as surface parking only because residents and visitors choose to frequent these areas of the city. These regulations, *inter alia,* will help to maintain and enhance visitation and use

[1] Petitioners' statement in the takings context that respondent does not contend these lots disproportionally contribute to unsightly or unhealthy areas (petition at 15) could not be further from the truth. The ordinance itself states plainly that these lots are the very reason for these regulations. (Petition at 34a-35a).



within these districts. Like the side yard setback that was argued to be of no value to the petitioner in *Gorieb, supra,* and the preservation regulations that were said to constitute highly negative value to the owners of Grand Central Terminal in *Penn Central, supra,* the safety and landscaping features of the challenged regulations provide a reciprocity of advantage that is highly valuable to these petitioners, whether or not they recognize this point. Construction of a new legal label called a "special assessment" cannot mask the fact that this legal issue was decided contrary to petitioners' position when the first zoning cases were decided *circa* 1926. The point was clearly restated in *Penn Central, supra:*

> In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the City in addition to the Terminal . . . Unless we are to reject the judgment of the New York City Council that preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole – which we are unwilling to do – we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless, appellants believe they are more burdened than benefitted by the law, but that must have been true, too, of the property owners in *Miller, Hadacheck, Euclid,* and *Goldblatt.*

438 U.S. at 134, 135, 98 S.Ct. at 2664, 2665.

Like the observations this Court directed to the appellants in *Yee v. City of Escondido,* 503 U.S. 519, 112

S.Ct. 1522, 118 L.Ed.2d 153 (1992), the regulations in question here do not require petitioners to use their land for parking purposes; but as long as they do, they are subject to zoning laws regulating that particular use even if they suffer financially in doing so. Building codes, fire safety codes, and a myriad of similar governmental regulations have financial affects on property owners identical to those at bar. Petitioners' special assessment argument ignores decades of takings jurisprudence upholding these kinds of regulations. Certiorari on this ground is not warranted.

## III. THERE IS NO EQUAL PROTECTION VIOLATION

The regulations at bar apply within those high density zoning districts most impacted by the problems they address. They apply to surface parking lots that are paved and contain over thirty spaces because those lots create a greater negative impact. These are the findings of the trial court and Georgia Supreme Court, and they are well supported by the record. Such distinctions clearly are rational. Further, as stated in *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976), in citing from *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966):

> [W]e are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen v. Ward*, 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722, that a legislature need not 'strike at all evils at the same time,' *Semler v. Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570, 571, 79 L.Ed. 1086, and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563.



427 U.S. at 305, 96 S.Ct. at 2517-18.

Atlanta's approach in addressing the most seriously affected areas of the City does not violate the Equal Protection Clause. Certainly this claim does not merit review by this Court.

## CONCLUSION

Regulatory takings law is complex, and there is little doubt that unresolved issues remain. This petition, however, presents no such difficulty. It attempts to construct a regulatory takings claim by ignoring that body of current takings law that does apply, while inappropriately utilizing cases that do not. The petition presents no significant federal question not already clearly resolved, and the requirements for a writ of certiorari have not been satisfied. The petition, accordingly, should be denied.

This the 12th day of April, 1995.

Respectfully submitted,

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